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TRANSPARENCY
INTERNATIONAL
Cambodia

BUSINESS BRIEF

● Facilitation
Payments

● Gift Giving &
Hospitality

● Whistleblowing

● Conflict of
Interest

Mr. Pech Pisey

Senior Director of Programmes
Transparency International Cambodia
piseypech@ticambodia.org

Transparency International Cambodia
No. 3, Street 390, Sangkat Boengkeng Kang 3,
Khan Chamkamorn, Phnom Penh, Cambodia
Phone: (+855) 23 214 430
Website: www.ticambodia.org
Global Website: www.transparency.org



Transparency International Cambodia is the fully-accredited local chapter of Transparency International and was officially founded on 5 July 2010 by a number of anti-corruption activists and professionals committed to the creation of transparent and accountable Cambodia. It has since built a strong institution arduously fighting corruption and promoting integrity, transparency and accountability in the country.

We work together with individuals and institutions at all levels including government, civil society, business, media and the wider public to achieve sustainable economic development, promote integrity, and fight against corruption.

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FACILITATION PAYMENTS

A teal speech bubble graphic with a tail pointing downwards and to the left, containing the text "Business Brief".

Business
Brief

One of the most common forms of corruption is “Facilitation Payments”. Facilitation payments are a small bribe paid to access a routine government service that companies and citizens at large have a legal right to access without additional payments.

Facilitation payments are a form of corruption that affect everyone, companies as well as ordinary citizens. For a long time “facilitation payments” have not been seen as crime but rather as a tool to overcome bureaucratic red tape. Without facilitation payments, companies could not process documents which often led to costly delays.

Surprisingly, facilitation payments are an exemption under the US Foreign Corrupt Practices Act (FCPA)¹. The FCPA states that its anti-bribery prohibition “shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action”².

The scope of this exemption has, however, become very narrow and opaque. By looking at recent corruption cases under the FCPA, it becomes clear that what traditionally has been accepted as exemption is now subject to a more stringent interpretation³. This stringent interpretation increases legal risks for companies who allow facilitation payments in their policy framework. In order for companies to protect themselves against legal risks, a policy prohibiting facilitation payments is strongly recommended. This business brief will explain the concept of facilitation payment as well as provide companies with a brief outline of a good facilitation payment policy.

¹ The Foreign Corrupt Practices Act of 1977

² The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-2(B).

³ <http://www.nortonrosefulbright.com/knowledge/publications/126090/facilitating-payments>

WHAT IS FACILITATION PAYMENT?

Facilitation payment is small bribe, called a “facilitating”, “speed” or “grease” payment; made to secure or expedite the performance of a routine or necessary action to which the payer has legal or other entitlement.⁴

LEGAL FRAMEWORK

“Facilitation payments” per se are not well defined in the Cambodian Anti-Corruption Law (2010). However, there is no threshold for an amount to constitute bribery, which means a facilitation payment, however small, could be considered as bribe in the Cambodian legal context. Indeed, Article 43 of the Anti-Corruption Law punishes “petty corruption” with a jail term from 7 days to 5 years. This alone should be sufficiently alarming for companies to adopt a zero tolerance policy against facilitation payments.

Under the UK Bribery Act (2010), facilitation payments are strictly prohibited regardless the size and frequency. As previously mentioned facilitation payments are an exemption under the FCPA but the scope of that exemption is becoming much narrower. In conclusion, companies are facing an increasing legal risk by having a policy that allows facilitation payments.

POLICY ON FACILITATION PAYMENT

The starting point for a strong facilitation payment policy is the definition and scope; to ensure that staffs at all levels are fully aware of what is a facilitation payment. This becomes important as low level staff serves as the first line of defense and they have to be aware of the legal risks of engaging in facilitation payments. This is especially important in a business environment like Cambodia where facilitation payment has been seen as a way to encourage government officials to work by supplementing their low salary.

In the policy, there should also be a clear reporting line for facilitation payments request. This will make management level aware of the issue and protect staff for being at fault for delays. A logbook is also introduced to companies by taking note in every transaction/request of facilitation payments. This is a way for companies to protect themselves of legal risks. To further explain, a company under the FCPA was found liable for

⁴ Business Principles for Countering Bribery 2013, Transparency International. http://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery

payments to customs officials for as low as \$4 because such payments were allegedly mischaracterized in the company's books and records as "intervention," "honoraires," "commissions," and "service fees"⁵. By having a logbook procedure companies can minimize the risk of facilitation payments being hidden or mischaracterized in the books.

In order to make the policy efficient, it needs to have sanctions stretching from written sanctions to dismissal depending on how severe the misconduct is.

THE BENEFITS OF HAVING A FACILITATION PAYMENT POLICY

Three main benefits for private companies or organisations for having the facilitation payment policy are:

- Prevent staff from wrong doing or corruption;
- Staff know how to deal with facilitation payment requests;
- Minimize legal risk by increasing staff awareness and by having clear supporting procedures.



⁵ In the Matter of Layne Christensen Co., SEC Admin. Proceeding No. 3-16216 (Oct. 27, 2014), available at <http://www.sec.gov/litigation/admin/2014/34-73437.pdf>

GIFT GIVING & HOSPITALITY

Gifts and hospitality are common in business relationships and are often seen as a token of appreciation or a sign of respect for a counterpart. These gifts are in most cases within appropriate boundaries and can be seen as bona fide business expenses. Unfortunately gifts and hospitality are also used as a tool to hide bribes and to influence both public officials and employees. The increased awareness and attention of corruption has to some extent transformed the traditional form of bribery – cash under the table – to more intricate schemes of hospitality and gifts.

This Business Brief will provide companies with guidance on gift giving and hospitality by outlining international acceptable standards and guidelines for the Cambodian context.

WHAT IS A GIFT AND WHAT IS A BRIBE?

The line between a gift and a bribe is not always easy to determine; different cultural and legal environments have different definitions. Each company is responsible for acquiring the necessary information and understanding of what is acceptable in their context. A good starting point is to determine if the gift is given to you personally or the company. Corporate gifts are usually gifts that are given openly with the implicit or explicit approval of the management on both sides. Examples of corporate gifts are corporate diaries, table calendars, pens, and notepads as well as a trophy/medal of appreciation.

These gifts are in most cases not considered as bribes. Personal gifts, on the other hand, are items given to or received by an individual/by his/her spouse or by any other third party acting on behalf of the individual.

GIFT GIVING AND HOSPITALITY IN CAMBODIA

In the Cambodian Anti-Corruption Law, a gift is a bribe if the property or service is given to or for the benefit of a person and not as a gift in accordance with the custom or tradition. The Anti-Corruption Unit (ACU) has put a gift limit of 25\$ for ACU officials, and gifts exceeding the value have to be returned. The ACU also require their officials to report business dinners and hospitality in advance⁶. This limit only applies to the ACU and not to other government institutions. Gift giving and hospitality remains a major issue in Cambodia and puts companies at risk of being victims of corruption. Kickbacks and gifts to procurement officers are particularly common in the Cambodian business environment.

Personal gifts are in most cases given without explicit approval of the management on both sides. A recommended policy/practice is also to only allow corporate gifts, and no gifts of cash, cash equivalents or loans should be allowed. For gift giving, do not give a gift that is likely to create a sense of obligation. This can be used as a rule of thumb and serve as a starting point for a gift giving and hospitality policy.

A cordial reception or disposition towards an individual, which might include entertaining guests in resorts, restaurants, conventions, concerts, sporting events and other special occasions can be acceptable. This is depending on the structure of the agenda; the business segment has to be more significant than the entertainment segment. For example, a one- hour factory visit followed by a two-day stay at a luxury hotel, an expensive lunch/dinner or karaoke and tickets to exclusive sporting events is not acceptable; the purpose of hospitality is not related to business but foremost leisure. In general, hospitality not directly related

⁶ <http://www.phnompenhpost.com/acu-lays-out-rules-receiving-gifts>

to the business, where non-business guests are invited (family/friends) and cost of hospitality exceeds US\$30 per head, needs approval from the management. To conclude, if in doubt for any hospitality or gifts, say no or ask the management for approval.

INTERNATIONAL STANDARDS ON GIFT GIVING AND HOSPITALITY

International standards for gift giving and hospitality can be found in the US Foreign Corrupt Practices Act (FCPA), UK Bribery Act, UN Global Compact (UNGC) and United Nations Office on Drugs and Crime (UNODC). UNGC and UNODC have developed an online training course (<http://thefightagainstcorruption.org/>) on gift giving and hospitality outlining good international practices for gift giving and hospitality.

According to the FCPA, items of nominal value, such as cab fares, reasonable meals and entertainment expenses, company promotional items, are unlikely to improperly influence an official. In contrast, the giving of extravagant gifts (such as sports cars, fur coats, and other luxury items) as well as widespread gifts of smaller items is considered as a pattern of bribery⁷. Bribes under the FCPA are not limited to bags of cash and transfers to offshore bank accounts. Certain gifts, travel, and entertainment can also create liability⁸. Reasonable and bona fide expenditures are not lavish. The Department of Justice guidance and enforcement suggests that first class airfare, lavish hotel stays, personal vacations, large gifts all will be viewed as unreasonable. Acceptable hospitality is directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency thereof⁹.

According to the UK Bribery Act, a gift is not a gift if someone is offering something of financial value which is to the advantage of another person and in doing so is intending that individual to perform a function improperly and impartially. In the event of an investigation, the intent to induce improper conduct would have to be proven to lead to prosecution¹⁰. Under the UK Bribery Act, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with

⁷ <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-systems/12-10-10rea-systems.pdf>

⁸ <http://fcpamericas.com/english/anti-corruption-compliance/gifts-and-hospitality-in-fcpa-compliance-four-cases-for-your-back-pocket/#sthash.GjtY185W.dpuf>

⁹ [https://www.mayerbrown.com/public_docs/Gifts HospandFacPayments-Houston_Jan2010.pdf](https://www.mayerbrown.com/public_docs/Gifts%20and%20FacPayments-Houston_Jan2010.pdf)

¹⁰ <https://www.saiglobal.com/compliance/resources/whitepapers/gifts-hospitality-bribes.htm>

a position of trust. This would be judged by what a reasonable person in the UK thought. The UK Bribery Act makes it clear that reasonable and proportionate business expenditure is acceptable. Bona fide entertainment is a legitimate and normal business practice and its importance is acknowledged in the legal framework¹¹.

In conclusion, hospitality is not prohibited under any international standards as long as it is a reasonable bona fide business expense. Personal gifts are in most cases given without explicit approval of the management on both sides. A recommended policy/practice is also to only allow corporate gifts, and no gifts of cash, cash equivalents or loans should be allowed. For gift giving, do not give a gift that is likely to create a sense of obligation. This can be used as a rule of thumb and serve as a starting point for a gift giving and hospitality policy.

THE BENEFITS OF HAVING A GIFT GIVING AND HOSPITALITY POLICY

Companies who have a clear policy and limits for gift giving and hospitality are communicating integrity both internally and externally. Having such a policy will limit the possibility for employees to become victims of corruption due to undue influence as gifts and hospitality can be used to create a sense of obligation. This sense of obligation can have a serious negative impact on employees' decision making – not putting the companies' best interest first. Having a policy with our suggested limit of only accepting corporate gifts below value of 30\$ without management approval will also provide the staff with a point reference, saving employees the embarrassment of personally declining a gift. Management awareness of gifts and hospitality offered/received by staff will also increase by having a policy with reporting requirements; this will limit the possibility of undue influence and provide the opportunity to stop corruption before it even happens. A strong gift giving and hospitality policy is a good first step towards building a culture of integrity!

¹¹ In the Matter of Layne Christensen Co., SEC Admin. Proceeding No. 3-16216 (Oct. 27, 2014), available at <http://www.sec.gov/litigation/admin/2014/34-73437.pdf>

WHISTLEBLOWING

Whistleblowing is increasingly recognised as an important tool in the prevention and detection of corruption and other malpractices. By disclosing wrongdoing in an organisation, whistleblowers can prevent and detect corruption before it reach the public, this can save businesses the reputational and financial losses that comes with a corruption scandal. The clandestine nature of corrupt behaviour means that it may never come to light unless cases are reported by people who discover them in the course of their work. But reporting can come at a high price: whistleblowers often expose themselves to great personal and professional risks in order to protect the companies' best interest. As a result of speaking out, they may lose their jobs, dampen their career prospects, and even put their own lives and their family's at risk.

This Business Brief will provide the private sector with some guidance on whistleblowing policy/procedure.

WHAT IS WHISTLEBLOWING?

Whistleblowing is the disclosure of information about perceived wrongdoing in an organisation, or the risk thereof, to individuals or entities believed to be able to effect action. The ultimate goal of whistleblowing for companies is to protect the companies' best interest and reputation. It achieves this by informing people or organisations that are in a position to prevent harm, to investigate or to take action against those responsible for wrongdoing.¹²

¹² Policy Position, Transparency International Secretariat 2010

WHISTLEBLOWING IN CAMBODIA ANTI-CORRUPTION LAW

Article 13 of the Cambodian Anti-Corruption Law states that measures should be taken to ensure the whistleblowers safety. However, in article 41 of the same law, whistleblowers who report could face the threat of imprisonment from 1 to 6 months and fines from 100,000 to 1,000,000 riels (approx. 25 to 250 US dollars) if their claim is later on found to be a false accusation.¹³ TI Cambodia's own study has found a potential correlation between this legal threat and a low level of reporting.¹⁴ Apparently in an attempt to promote corruption reporting, the Royal Government of Cambodia is now drafting a whistleblower protection law.

Transparency International Cambodia, for its part, recently issued a policy brief on "The Need for a Good Whistleblower Protection Law in Cambodia" in January 2016.

THE ROLE OF WHISTLEBLOWING IN THE FIGHT AGAINST CORRUPTION

Corruption is by nature hard to detect and it is usually only those engaged in corrupt deals or those who work with them that are aware of it. Insiders are among the few people who are able to report cases of corruption (past or ongoing) and identify the risk of future wrongdoing. By helping to detect corruption cases, whistleblowers play a critical role in converting a vicious cycle of secrecy into a virtuous cycle.

Detection of corruption is a pre-condition to initiate related investigations and prosecution. However, only if corruption cases are effectively investigated can a culture of corruption change and a culture of integrity prevail.

Major bribery and corruption scandals demonstrate the damage done by the failure to report wrongdoing as soon as it is discovered. Yet indifference, fear of reprisal, and misplaced loyalty as well as an overall culture of silence often deter potential witnesses and whistleblowers from speaking out.¹⁵

¹³ Cambodian Anti-Corruption Law 2010

¹⁴ Youth Integrity Survey, Transparency International Cambodia, 2015

¹⁵ Policy Position, Transparency International Secretariat 2010

WHAT IS A GOOD WHISTLEBLOWING POLICY AND PROCEDURE FOR BUSINESS?

Whistleblowing policies should encourage employees to speak out if they have legitimate concerns about wrongdoing, as distinct from individual grievances. They should also establish an accessible procedure for doing so. The policy may stand-alone or part of a wider code of conduct.

A GOOD WHISTLEBLOWING POLICY SHOULD:

- be simple and easy to understand
- cover as much of the workforce as possible
- clearly set out the standards of behaviour expected of employees
- make clear what sorts of disclosures or malpractices are covered;
- make clear how and who to approach with any concerns (including contact details)
- let employees circumvent the person or part of the business to which the concern relates. Many organisations now have confidential whistleblowing hotlines to ensure employees feel confident and comfortable making disclosures; give an outline of the procedural
- steps involved in investigating any concerns and what steps may be taken should wrongdoing be established;
- establish an encouraging protection policy for good faith whistleblowers.



You have concerns or issues about wrong, dishonest or illegal activity involving the business



Discuss with your line manager or head of department



If concerns appear well founded, line manager or department head tells individual responsible for internal Risk Management (RM)



If concerns appear well founded, line manager or department head tells individual responsible for internal Risk Management
Person responsible for internal Issues log



RM or HR considers the need to discuss with owner, senior partner or director and/ or major shareholder Log reviewed by owner/senior partner, senior director or major shareholders

Source: Policy Position, Transparency International Secretariat 2010

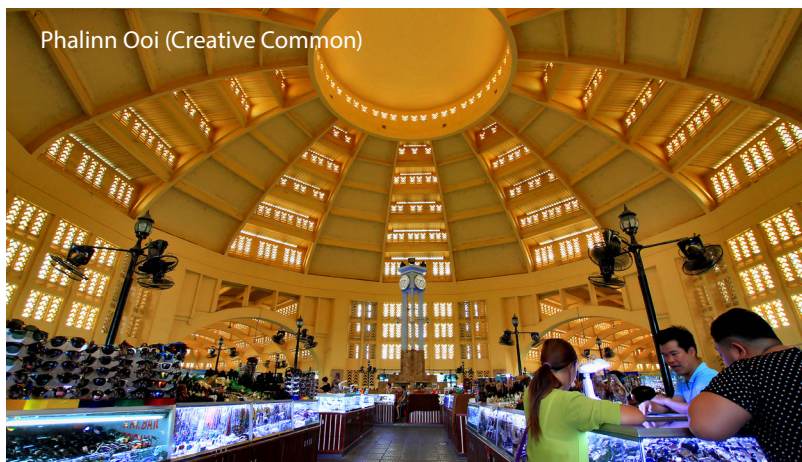
WHY BUSINESSES NEED TO HAVE WHISTLEBLOWING POLICY?

In summary, whistleblowing policy/procedure is a necessary component within an organization. Without it, fraud, misconduct, and failure can become prominent within an organization. This can in extension lead to significant negative reputational and financial impact. By promoting clear communication, keeping the organization's goals in focus for the entire organization, one can certainly minimize their chances of reaching an organizational disaster. A clear whistleblowing procedure is also a key for a building a culture of integrity within a business, empowering employees to speak up by setting a clear tone from the top.

CONFLICT OF INTEREST

Companies should establish policies and procedures to identify, monitor and manage conflicts of interest which may give rise to a risk of bribery – actual, potential or perceived.

Conflict of interest is a global issue for companies of all forms and sizes. When private interest is put before the company's best interest there is increasing risk for the company to become a victim of corruption. Therefore it is crucial for companies to be aware of the private interest of staff members at all levels from the board to low level staff. This is done through asset declarations and/or declaration of interest, where staff members list down other assets or positions that might influence their decision making. This business brief will explain the concept of conflict of interest as well provide companies with a brief outline of a good conflict of interest policy.



WHAT IS CONFLICT OF INTEREST?

Conflict of interest is defined by Transparency International as a *“situation where an individual or the entity for which they work, whether a government, business, media outlet or civil society organisation, is confronted with choosing between the duties and demands of their position and their own private interests”*.

Article 4 in the Cambodian Anti-Corruption Law (2010) defines conflict of interest as “Conflict of Interest shall mean a family, financial, political, or other personal interest, which may influence, or appear to influence the performance of that person’s official duties”.

This becomes a problem for companies because their best interest might not be prioritized by employees, for example family, personal business interest and/or other relationships will influence the decision making. This can create situations where companies are buying goods/ services at a higher cost or of a lower quality because of some private interest of the person in charge of making such purchases.

A conflict of interest situation can also be created when a person responsible for procurement is accepting gifts or commission in exchange for favouring a supplier-company. It is important to keep in mind that corruption takes many forms - cash, gifts and promises of favours are all forms of corruption.

POLICY ON CONFLICT OF INTEREST

The starting point for a strong conflict of interest procedure is the definition and scope; because of the complicated nature of conflict of interest, a clear definition including examples is required. Companies need to ensure that staff members are fully aware of what is classified as conflict of interest, especially in a business environment like Cambodia where gifts and commissions are very common. In the policy it is very important to stress that all staff members are required to submit declaration upon joining the company and/or from the day the policy is implemented. Staff should also declare if any new potential conflict of interest arises. The policy should be monitored and staff members should make an annual declaration of interest and submit it to Human Resources. It is the responsibility of Human Resources to ensure that all staff submits the declaration in a timely manner and notify relevant heads of units of their staffs' declarations.

In order to make the policy efficient it needs to have sanctions stretching from written sanctions to dismissal depending on how severe the misconduct is.



THE BENEFITS OF HAVING A CONFLICT OF INTEREST POLICY

An immediate benefit of having a conflict of interest policy is a stronger protection of companies' best interest. With a conflict of interest policy, companies can avoid being used by staff members for personal gains; this will save the company money on procurement and ensure that services/staff are chosen based on merits rather than relationship. A good conflict of interest policy will also help staff to avoid situations where they can have a perceived conflict of interest. This is crucial for maintaining a good working environment because perceived conflict of interest has deteriorating effect on staff morale. In a high corruption risk environment like Cambodia, a conflict of interest policy is an excellent tool to control the internal corruption risk, increase awareness and limit staff possibility to use the company for personal gains. A key to implement a conflict of interest policy successfully is by having clear sanctions for staff who fail to comply and regular monitoring of staff interest by mandatory declarations of interest. A conflict of interest policy is a good starting point for companies who want to cut overhead and other costs and build a culture of integrity.



Transparency International Cambodia

No. 3, Street 390, Sangkat Boengkeng Kang 3, Khan Chamkamorn, Phnom Penh, Cambodia

Phone: (+855) 23 214 430, Website: www.ticambodia.org

Global Website: www.transparency.org

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